

82-1428

Office-Supreme Court, U.S.

FILED

FEB 17 1983

ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT BRITTON, etc., et al.,

Petitioners,

v.

CAROLYN N. HESS, etc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THOMAS R. McALPINE

Counsel of Record for
Petitioner Robert Britton

ALABAMA DEPARTMENT OF CORRECTIONS
101 South Union Street
Montgomery, Alabama 36130

(205) 834-1227

QUESTION PRESENTED

Whether the "relation back" doctrine found in Rule 17(a), Federal Rules of Civil Procedure can be used in a suit brought under 42 U.S.C. § 1983 to toll a limitation period in a wrongful death statute where the limitation period is a substantive part of the statute and can not be tolled under state law.

PARTIES

In addition to the Appellee-defendant whose name is contained in the caption, the defendants in the case below included James Record, Charles Stone, Robert Spears and Woodrow Balch, individually and as members of the Madison County Commission of Madison County, Alabama and Bob Eddy individually and as Sheriff of Madison County, Alabama.

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED.....	i
PARTIES.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	5
The Facts.....	5
The District Court Proceedings.....	6
The Court of Appeals Proceedings.....	8
REASONS FOR GRANTING THE WRIT.....	10
I. State Law Must Be Applied Under 42 U.S.C. § 1988.....	10
II. A State Substantive Rule Controls Rule 17(a) F.R.C.P. Under 42 U.S.C. Section 1988.....	14
CONCLUSION.....	20
CERTIFICATE OF SERVICE.....	21
<u>APPENDICES</u>	
APPENDIX A: District Court Order.....	23
Appendix B: District Court Opinion.....	24

	<u>PAGE</u>
APPENDIX C: Court of Appeals Opinion.....	37
APPENDIX D: Court of Appeals Judgment Entry....	52
APPENDIX E: Court of Appeals Order Denying Rehearing.....	54

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Board of Regents of the University of</u> <u>New York v. Tomanio, 446 U.S. 478 (1980).....</u>	15
<u>Board of Trustees of the University of</u> <u>Alabama v. Harrell, 43 Ala. App. 258,</u> <u>188 So.2d 555 (1965).....</u>	13
<u>Bonner v. Williams</u> 370 F.2d 301 (5th Cir. 1966).....	12
<u>C.F. Halstead Contractors, Inc. v. Lowery</u> 51 Ala. App. 86, 282 So.2d 909 cert. denied, 291 Ala. 775, 282 So.2d 913 (1973).....	12
<u>Downtown Nursing Home, Inc. v. Pool</u> 375 So.2d 465 (1979) cert. denied 445 U.S. 930 (Ala. 1980).....	14,16
<u>Hanna v. Plummer</u> 380 U.S. 460, 464 (1965).....	17
<u>Hatas v. Partin</u> 278 Ala. 65, 175 So.2d 759 (1965).....	12
<u>Hess v. Eddy</u> 689 F.2d 977 (11th Cir. 1982).....	1,8
<u>Ivey v. Wiggins</u> 276 Ala. 106, 159 So.2d 618 (1964).....	12
<u>James v. Murphy</u> 392 F. Supp. 641 (M.D. Ala. 1975).....	13
<u>Johnson v. Railway Express Agency, Inc.</u> 421 U.S. 454 (1975).....	16
<u>Kennedy v. Davis</u> 171 Ala. 609, 55 So. 104 (1911).....	12

PAGE

<u>Levinson v. Deupree</u>	
345 U.S. 648 (1953).....	17,18
<u>Louisville N.R.R. v. Perkins</u>	
1 Ala. App. 376, 56 So. 105 (1911).....	12
<u>McMickens v. Waldrop</u>	
406 So.2d 867 (Ala. 1981).....	14
<u>Moor v. County of Alameda</u>	
411 U.S. 693 (1973).....	11
<u>Nicholson v. Lockwood Greene Engineers, Inc.</u>	
278 Ala. 497, 179 So.2d 76 (1965).....	13,14
<u>Parker v. Fies & Son</u>	
243 Ala. 348, 10 So.2d 13 (1942).....	16
<u>Pollard v. United States</u>	
384 F. Supp. 304 (M.D. Ala. 1974).....	13
<u>Robertson v. Wegman</u>	
436 U.S. 584 (1978).....	11

STATUTES

Title 28 U.S.C. § 1254.....	2
Title 28 U.S.C. § 2072.....	4,18
Title 42 U.S.C. § 1983.....	5,15
Title 42 U.S.C. § 1988.....	3,7,10, 14,16
§ 6-5-410, <u>Code of Alabama</u> 1975.....	1,3,7,11, 13,14,16

OTHER AUTHORITIES

Rule 17(a) Federal Rules of Civil Procedure....	4,8,14, 15,17,18,19
---	------------------------

OPINIONS BELOW

1. The opinion of the United States District Court for the Northern District of Alabama, finding that the action below was subject to dismissal due to the failure of the plaintiff to qualify as administratrix of the estate of her decedent prior to initiating the action and prior to the expiration of the two (2) year time period required by Section 6-5-410, Code of Alabama, 1975, is reproduced as Appendix B hereto, pp. 24.

2. The opinion rendered by the United States Court of Appeals for the Eleventh Circuit, reversing the District Court, is reported as Hess v. Eddy, 689 F.2d 977 (11th Cir. 1982) and is reproduced as Appendix C hereto, pp.37.

JURISDICTION

The decision of the Court of Appeals for the Eleventh Circuit, together with its opinion, was issued on October 21, 1982. See Appendix C and D, pp. 37 & 52.

The Petition for Rehearing En Banc of the Petitioners was denied on December 10, 1982. See Appendix E, pp.54.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254 (1), this being a petition for writ of certiorari seeking review of the decision of a Court of Appeals in a civil case.

CONSTITUTIONAL, STATUTORY AND

RULE PROVISIONS INVOLVED

1. Title 42 U.S.C. Section 1988 provides, in pertinent part:

The jurisdiction in civil and criminal matters conferred on the District Courts by the provisions of this chapter and Title 18 for the protection of all persons in the United States and their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to govern the said courts in the trial and disposition of the cause . . .

2. Section 6-5-410, Code of Alabama, 1975, which provides in pertinent part:

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama and not

elsewhere, for the wrongful act, omission or negligence of any person, persons, or corporation, his or their servant or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence had it not caused death.

* * *

(d) Such action must be commenced within two years from and after the death of the testator or intestate.

3. Rule 17(a), Federal Rules of Civil Procedure which provides in pertinent part:

No action shall be dismissed on the grounds that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by or joinder or substitution of, the real party and interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party and interest.

4. Title 28 U.S.C. Section 2072 provides, in pertinent part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeal of the United States in civil action . . .

Such rules shall not abridge, enlarge or modify any substantive right . . .

STATEMENT OF THE CASE

The Facts

The Plaintiff commenced this action on October 30, 1980 in the United States District Court for the Northern District of Alabama seeking damages under 42 U.S.C. Section 1983 for an alleged deprivation of civil rights resulting in death. (R.1)¹ The Complaint alleged that, David Milano, Plaintiff's decedent, had been a prisoner in the Madison County Jail and was killed in an altercation with another inmate on November 2, 1978. The Complaint alleged failure to provide adequate security for Plaintiff's decedent while he was in the jail and that such failure resulted in his death. (R.2-3).

The defendants named originally were the Sheriff and members of the Madison County Commission. On January 14, 1981 an amendment was filed adding the Appellee, Robert Britton, Commissioner of the Alabama State Board of Corrections, as a defendant.

¹References to (R.) are to the record on appeal in the Eleventh Circuit Court of Appeals.

Among the allegations contained in the complaint was the statement that the plaintiff was the administratrix of Milano's estate at the time the action was commenced (R.1). Such allegation was not correct. The plaintiff did file a petition with the Probate Court of Madison County seeking letters of administration for Milano's estate on October 30, 1980 (R.9,34).

However, she failed to carry out the mandatory procedures necessary for purposes of Alabama law to be appointed administratrix of Milano's estate until February 12, 1981 (R.9,34,75). The statutory time for wrongful death actions expired on November 2, 1980 without plaintiff's proper appointment (R.9,34).²

The District Court Proceedings

Once all parties were properly in court, each of the defendants moved for summary judgment on grounds of the plaintiff's neglect to bring the action as ad-

²See Section 6-5-410(d) Code of Alabama 1975.

ministratrix of the estate within the two (2) years permitted by law (R.8-16,32-33). The motions were duly granted by the District Judge and the complaint was dismissed with prejudice on June 29, 1981. (See Appendix A, pp.23)

In his opinion, the District Judge found that Section 6-5-410 Code of Alabama 1975 provides the remedy for wrongful death under 42 U.S.C. Section 1988. Judge Propst also concluded that Section 6-5-410 required that such actions must be initiated by the "personal representative"³ of the decedent "within two years from and after the death of the testator or intestate". The two (2) year limitation period is an integral portion of the substantive cause of action and not merely a procedural statute of limitations, Downtown Nursing Home, Inc. v. Pool, 375 So.2d 465 (Ala. 1979). Thus, plaintiff's failure to properly qualify as administratrix left her suit a "nullity". Downtown Nursing Home, Inc. v. Pool, supra. Judge Propst also ruled that the state of Alabama's legis-

³The term "personal representative" as used in §6-5-410 describes the person who may bring a wrongful death action as being only the decedent's duly appointed administrator. Hatas v. Partin, 278 Ala.65, 175 So. 2d 759 (1965).

lative policy of restricting survivorship rights to duly appointed personal representatives, who must bring the actions within two (2) years, is not unreasonable and that Alabama law controls in determining whether such representative has been properly appointed.

In due time, the Plaintiff filed notice of appeal to the Eleventh Circuit Court of Appeals (R.90).

The Court of Appeals Proceedings

After oral arguments before a three judge panel made up of two (2) judges from the Eleventh Circuit and Judge Goldberg, from the Fifth Circuit, sitting by designation, the District Court was reversed. (See, Appendix D, pp.52). The rationale of the Court of Appeals, published as Hess v. Eddy, 689 F.2d 977 (11th Cir. 1982) and attached hereto as Appendix C, was based upon the conclusion that Rule 17(a) of the F.R.C.P. "relation back" rule was applicable to this action and that the plaintiff's late qualification as administratrix of the decedent's estate related back to the time when her suit was originally filed, thus, saving it.

The defendants filed a Petition for Rehearing with a suggestion for Rehearing En Banc. This was denied on December 10, 1982. (See Appendix E. pp.54)

REASONS FOR GRANTING THE WRIT

This Case Involves a Serious Conflict Between 42 U.S.C. § 1988 and the Federal Rules of Civil Procedure

This case presents a crucial question in the conduct of civil actions in federal courts under the Civil Rights Acts. Moreover, this case presents the Court with the sobering situation of widely varied results in federal actions where both state law, under 42 U.S.C. § 1988, and the Federal Rules of Civil Procedure must be applied by the lower courts.

I. State Law Must Be Applied Under 42 U.S.C. § 1988

There is no "wrongful death" action under the Civil Rights Acts but 42 U.S.C. § 1988 does permit the employment of the common law of the particular state, which is the situs of the action, "as modified and changed by the constitution and statutes" to be extended to and to govern the trial and disposition of

the action. Robertson v. Wegman, 436 U.S. 584 (1978);
Moor v. County of Alameda, 411 U.S. 693 (1973).

As Madison County, Alabama was the situs of this action, the appropriate state law would be Title 6-5-410 Code of Alabama 1975, which provides as follows:

§ 6-5-410. Wrongful act, omission or negligence causing death.

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate. (Code 1852, §§ 1940, 1941; Code 1867, §§ 2299, 2300; Code 1876, §§ 2641-2643; Code 1886, § 2589; Code 1896, § 27; Code 1907, § 2486; Acts 1911, No. 455, p. 484; Code 1923, § 5696; Code 1940, T. 7, § 123.)

Wrongful death was not a remedy in existence in the common law of Alabama but was a purely statutory creation. Kennedy v. Davis, 171 Ala. 609, 55 So.104 (1911); Ivey v. Wiggins, 276 Ala. 106, 159 So.2d 618 (1964). The purposes of this statutory right were not to compensate or recompense anyone. Rather, it was always intended to be purely punitive, i.e. to mete out civil punishment to wrongdoers. Louisville N.R.R. v. Perkins, 1 Ala. App. 376, 56 So. 105 (1911); C. F. Halstead Contractor, Inc. v. Lowery, 51 Ala. App. 86, 282 So.2d 909, cert. denied, 291 Ala. 775, 282 So. 2d 913 (1973).

Thus, Alabama created a special right, punitive in nature. They then interpreted the words, "personal representative" who was the one person permitted by law to bring this special action, to mean only the executor or administrator of the decedent. Hatas v. Partin, 278 Ala. 65, 175 So.2d 759 (1965); Bonner v. Williams, 370 F.2d 301 (5th Cir. 1966). The cause of action is not an asset of the decedent's estate. Board of Trustees of University of Alabama v. Harrell, 43 Ala.

App. 258, 188 So.2d 555 (1965). Rather, it created a special right for the administrator of the decedent to act as the deceased's agent by legislative appointment for the effectuation of the legislative policy of prevention of homicides through the deterrent value of the infliction of punitive damages. James v. Murphy, 392 F. Supp. 641 (M.D. Ala. 1975).

As can be readily ascertained by glancing at the act, it contains a statutory period during which it must be commenced. Title 6-5-410(d). There is no applicable statute of limitations and the statutory period contained in the statute is considered to be of essence to the right. Pollard v. United States, 384 F. Supp. 304 (M.D. Ala. 1974); Nicholson v. Lockwood Greene Engineers, Inc., 278 Ala. 497, 179 So.2d 76 (1965).

Nor do any of the rules for tolling a statute of limitations have any application to the wrongful death law as the period required for commencement is part of the right. Pollard v. United States, supra. There is no saving clause expressed or implied in the

act creating an otherwise non-existent right of action, suspending or excepting the operation of the statutory period. Nicholson v. Lockwood Greene Engineers, Inc., supra. When the two (2) year period ends, the remedy itself expires, and not just the time for employing it. Downtown Nursing Home, Inc. v. Pool, 375 So.2d 465 (1979), cert. denied 445 U.S. 930 (Ala. 1980); McMickens v. Waldrop, 406 So.2d 867 (Ala. 1981).

The inevitable consequences are apparent, the suit when not brought by the proper party within the two (2) year period was a nullity. I had nothing to relate back to.

II. A State Substantive Rule Controls Rule 17(a) F.R.C.P. Under 42 U.S.C. Section 1988

The Court of Appeals below understood the necessity of the Plaintiff's compliance with the provisions of Title 6-5-410 Code of Alabama 1975, in that they agreed that the "personal representative" had to be the probate appointed administrator of the estate and that this representative had to bring the suit prior

to the expiration of the two (2) year period.

But from that point, the Court of Appeals veered completely from the longstanding and proper interpretation of the right of action. Judge Goldberg's opinion held that while the plaintiff was not the "personal representative" under state law prior to the expiration of the remedy, that her subsequent appointment "related back" to the initial filing due to the provisions of Rule 17(a), F.R.C.P. See Appendix C at pp. 37.

The Eleventh Circuit thus took the same course and committed a similarly grievous error for which this Court took the Second Circuit to task in Board of Regents of the University of New York v. Tomanio, 446 U.S. 478 (1980). For, in reality, the Eleventh Circuit, like the Second Circuit, had tolled a state limitation period in an action brought under 42 U.S.C. § 1983 by resorting to a federal rule when the state substantive law permitted no such tolling.

The ruling of this Court in Tomanio made it absolutely clear that when a federal court applied state

law pursuant to §1988 which did not contain a substantive limitation period that the state tolling rules would also be applied. See also, Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

As Alabama law permits no tolling of Title 6-5-410(d), this marked a classic error by the court of appeals below. Downtown Nursing Home, Inc. v. Pool, 375 So.2d 465 (Ala. 1979), cert. denied, 445 U.S. 930 (1980). Again, as pointed out in the previous portion of this brief, the two (2) year period provided in Title 6-5-410(d) is a restriction on the remedy itself and not merely on the exercise of the remedy. Parker v. Fies & Son, 243 Ala. 348, 10 So.2d 13 (1942). Therefore, when the plaintiff commenced her suit and allowed the remedy to expire without being properly appointed as the "personal representative" of the estate, then her subsequent proper appointment had nothing to "relate back" to. Under the controlling Alabama law, the action had become a nullity and was properly subject to dismissal. Downtown Nursing Home, Inc. v. Pool, supra.

Furthermore, Rule 17(a) F.R.C.P. is no more than a federal procedural rule and while, in an action such as the instant one, it should control state procedural law, it should not and can not control state substantive law. Hanna v. Plummer, 380 U.S. 460, 464 (1965).

As noted by the Court of Appeals, Rule 17(a) is a codification of the doctrine of "relation back" enunciated in Levinson v. Deupree, 345 U.S. 648 (1953). See Appendix C at pp. 37. In Levinson, the district had dismissed an action based on wrongful death in Kentucky due to the running of an applicable statute of limitations before the plaintiff filed in the correct venue (although the suit had been filed within the wrong venue in time). The Sixth Circuit reversed, find in part:

"[i]t is significant that the limitation held by the District Court to bar the action is not embodied in the substantive law which creates the right of action. The Kentucky death statute... contains no limitations...[Where a] statute that creates the right does not prescribe the period of limitation, the limitation as to time contained in a separate statute is not to be treated as a part of the right." Deupree v. Levinson, 186 F.2d 297, 302 (6th Cir. 1950).

In a subsequent appeal, this Court affirmed the Sixth Circuit upon the explicit proviso that the time limitation was not a part of the substantive remedy upon which the action was brought, as follows:

"As we held in *Gracia*, a time limitation deemed attached to the right of action created by the state is binding in the Federal forum."

* * *

"...[i]t is clear that we are not dealing with an integral part of the right created by Kentucky." 345 U.S. at 651 and 652

Here, the Court of Appeals has manipulated at purely procedural rule (Rule 17(a) F.R.C.P.) to overcome a substantive state provision under the authority of the Levinson decision which specifically excluded this situation.

More importantly, this result appears to violate the Enabling Act for the Federal Rules of Civil Procedure, 28 U.S.C. § 2072 which provides, in part, the following guidelines for implementation and exercise of the rules:

The Supreme Court shall have the power to prescribe by general rules, the forms

of process, writs, pleadings, and motions and the practice and procedure of the district courts and courts of appeal of the United States in civil actions...

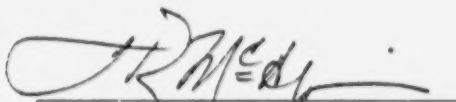
Such rules shall not abridge, enlarge or modify any substantive right ...

Thus, it seems clear that the Court of Appeals erred regarding rule 17(a) in one of two (2) ways. Either Rule 17(a) is not nearly so broad as they would have it or the scope of Rule 17(a) is plainly beyond the express scope of its enabling act.

CONCLUSION

Because this case presents an important question concerning the conduct of suits in federal courts, a conflict between federal and state status and the Federal Rules of Civil Procedure, and because the Court of Appeals decided it incorrectly, this Court should grant certiorari.

Respectfully sbumitted,

A handwritten signature in dark ink, appearing to read 'T R McAlpine', written over a horizontal line.

Thomas R. McAlpine
101 South Union Street
Montgomery, Alabama 36130
(205) 834-1227

Counsel of Record for
Petitioner, Robert Britton

CERTIFICATE OF SERVICE

I, Thomas R. McAlpine, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 16 day of February, 1983 I did serve copies of this Petition and the included Appendices on respondent and upon all other parties separately represented, by placing in the United States Mail, first class postage prepaid, three copies properly addressed to the following counsel of record:

James R. Foley, Jr., Esquire
Counsel for Respondent
217 Randolph Avenue
Huntsville, Alabama 35802

George W. Royer, Jr., Esquire
Counsel for Petitioners Eddy,
Record, Stone, Spears and Balch
108 Jefferson Street North
Huntsville, Alabama 35804

I further certify that I have served all parties required to be served.

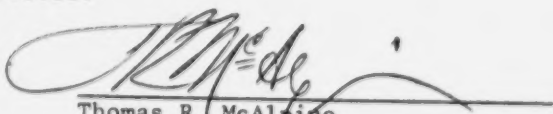

Thomas R. McAlpine
Assistant Attorney General

TABLE OF APPENDICES

<u>App. No.</u>	<u>Page No.</u>	<u>Description</u>
A	23	District Court Order
B	24	District Court Opinion
C	37	Court of Appeals Opinion
D	52	Court of Appeals Judgment Entry
E	54	Court of Appeals Order Denying Rehearing

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CAROLYN N. HESS, Admin-)
istratrix of the Estate)
of David Milano, Dec-)
eased, and as widow of)
David Milano, Deceased,)
)
Plaintiff,)
)
-v-)
)
BOB EDDY, et al.,)
)
Defendants,)

C.A. CV80-PT-5275-NE

ORDER

In accordance with a contemporaneously
entered memorandum opinion, defendants'
Motions for Summary Judgment are GRANTED, and
this cause and action are DISMISSED with
prejudice.

DONE and ORDERED this 29th day of
June, 1981.

/s/ Robert B. Propst
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CAROLYN N. HESS, Admin-)	
istratrix of the Estate)	
of David Milano, Dec-)	
eased, and as widow of)	
David Milano, Deceased,)	
)	
Plaintiff,)	
)	
v.)	C.A. CV80-PT-5275-NE
)	
BOB EDDY, et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION

This is the second time this court has considered this case. On the first consideration, the court granted the motion to dismiss for failure to state a claim and gave leave to amend. At that time the court did not address arguments, raised on motions for summary judgment, that the action is barred because of the failure of the plaintiff to qualify as administratrix within two years

after the death of plaintiff's intestate.

There is no dispute that plaintiff's intestate died on November 2, 1978. There is further no dispute that plaintiff commenced this action on October 31, 1980, but that plaintiff was not appointed as administratrix of the estate of David Milano, plaintiff's intestate, until February 12, 1981, more than two years after Mr. Milano's death for which damages are claimed in these proceedings.

Jurisdiction in this case is invoked pursuant to the provisions of 42 U.S.C. § 1983. Federal law does not cover the survival of civil rights actions under § 1983. Moor v. County of Alameda, 411 U.S. 693, 702 (1973). Federal law being deficient, we must turn to "[t]he common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Con-

stitution and laws of the United States"

42 U.S.C. § 1988. Brazier v. Cherry, 293 F.2d 501 (5th Cir. 1961).

In Alabama a personal representative may commence an action to recover damages "for the wrongful act, omission or negligence of any person ...[s]uch action must be commenced within two years from and after the death of the testator or intestate." § 6-5-410, Code of Alabama 1975. The only other Alabama statute providing for recovery for wrongful death is § 6-5-391, Code of Alabama 1975. This statute, applying to the death of minors, is not here applicable. Section 6-2-38, Code of Alabama 1975 provides that, "An action by a representative to recover damages for wrongful act, omission or negligence causing the death of the decedent under Sections 6-5-391 and 6-5-410 must be commenced within two years from the death."

If Alabama law is strictly applied to this cause, there is no question that it is due to be dismissed. Strickland v. Mobile Towing and Wrecking Co., Inc., 293 Ala. 348, 303 So.2d 98 (1974); Downtown Nursing Home, Inc. v. Pool, 375 So.2d 465 (Ala. 1979).

In Strickland, supra, plaintiff filed suit under the provisions of the Jones Act, 46 U.S.C. § 688. The suit was filed by Strickland as administrator on March 11, 1968, after his intestate's death on March 12, 1965. Strickland was appointed administrator of the estate on March 13, 1968. The Alabama court held that the action was governed by 45 U.S.C. § 56, which provided in part: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

Saying that the three year limitation provision was a condition precedent to any right to bring the action, consistent with

with Alabama's construction of the time limit under § 6-5-410, Code of Alabama 1975, the Alabama Supreme Court held that any action purported to have been filed by the administrator prior to March 13, 1968 was a nullity and that being a nullity, there was nothing that any amendment could relate back to.

In Pool, supra, the original plaintiff filed suit on November 23, 1977 for the wrongful death of the intestate on November 24, 1976. No plaintiff was actually appointed administrator until February 5, 1979. The Supreme Court of Alabama held that:

"In the present case, Johnnie F. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under § 6-5-410, as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c) ARCP, does not apply."

375 So.2d at 466

Plaintiff in this case seems to recognize that an application of Alabama law

pursuant to 42 U.S.C. § 1988 would defeat her action and that the cause would be due to be dismissed. Plaintiff argues, however, for the application of a law consistent with the intents and purposes of 42 U.S.C. § 1983 or perhaps even a higher law. The zealous argument of plaintiff has caused this court to give considerable consideration to the applicable law.

The court recognizes the broad remedial intents and purposes behind § 1983, and that it is to be liberally interpreted and applied with a sweep as broad as its language.

Griffin v. Breckenridge, 403 U.S. 88, 97 (1971)

However, this court is also of the opinion that all laws must be applied with a degree of certainty, and not by virtue of a judge's whim or caprice. Otherwise "government of laws" will become "government of men."

In seeking guidance in this case, the court has looked primarily to Robertson v.

Wegmann, 436 U.S. 584 (1978) and Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961).

In Robertson, supra, Justice Marshall discussed many of the principles referred to above in an opinion concurred in by a majority of the Court. In that case, the court determined, in considering Louisiana survival statutes, that a § 1983 action did not survive the death of the injured party. Louisiana law having provided for survival in most actions, the Supreme Court held that, "Despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of absolute survivorship." 436 U.S. at 590.

The court further says:

"That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of

the state law to which § 1988 refers us. A state statute cannot be considered inconsistent with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby."

436 U.S. at 593.

Robertson, supra, does indicate that it intimates "no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." 432 U.S. at 594. However, this case is not a case where there was a total abatement of a death action, and this court is convinced that the general principles of Robertson, supra, are applicable here. They are particularly applicable to

plaintiff's policy arguments with regard to
§ 2983.

Plaintiff argues that the limitation under Alabama law is substantive rather than procedural, and that federal law should apply. Obviously, we start out with the premise that federal law applies, but federal law directs us back to currently effective state law on the general right of survival. Brazier v. Cherry, supra. In Brazier, supra, the court said:

"Consequently, it does not really matter whether in the eyes of the local law the local statute, rule or decision thus incorporated by references is in the category of substance, or procedure, or mixed. Congress adopts the whole 'common law, as modified and changed by the Constitution and statutes of the State' without regard to its technical local characterization."

293 F.2d at 409. Also see Footnote 20 on page 409.

Plaintiff argues that F.R.Civ.P. 17 governs and that the court should allow an

amendment so that the suit can be brought in the name of the real party in interest. The problem with this is that the "real party in interest" did not exist within the two year limitation period.

In Pollard v. United States, (M.D. Ala. 1974), (a § 1983 action), the plaintiffs argued "[t]his Court should adopt the state limitation provision only if it would assist plaintiff and should disregard it if its effect would be to bar an otherwise meritorious claim because of lapse of time." Chief Judge Johnson stated that "such a construction of 42 U.S.C. § 1988 would be contrary to the well-settled practice of adopting applicable state limitation periods and would lead to the anomalous result in many cases of there being no limitation period within which such federal claims must be pursued."

Plaintiff also argues that under Alabama law the personal representative, in bringing

wrongful death actions, is not seeking to benefit the deceased's estate, but is acting as an agent for certain designated beneficiaries. Plaintiff further argues that plaintiff is the sole beneficiary so designated and, for this reason, her independent claim as widow should remain notwithstanding her status as personal representative. Assuming, arguendo, that plaintiff, individually, has an independent claim, her individual claim, not being that of a personal representative, would not be governed by the same statute of limitations as is a wrongful death action under Alabama law. Any individual claim of plaintiff for her own interest under § 1983 would be governed by Section 6-2-39(5), Code of Alabama 1975. The following provision, which provides for a limitation of one year, of said statute would govern such a claim:

"Actions for any injury to the person or rights of another not arising from contract and not herein specifically enumerated."

Thus any individual claim of plaintiff would have been barred after one year.

A similar case to this was decided by U. S. District Judge Hand of the Southern District of Alabama in Bracey v. Wallace, C. A. 76-133-H, decided November 30, 1976 (unreported). Judge Hand distinguished Dempree v. Levinson, 345 U.S. 648 (1953), on the basis that the two year limitation period prescribed in the Alabama wrongful death statute is of the essence of the action itself. Thus Judge Hand said, "[f]ailure to bring the action within the two year period prescribed by the Alabama wrongful death statute will bar both the right and the remedy." A copy of Judge Hand's opinion is attached.

The court ultimately concludes that:

(1) Alabama's policy of restricting

certain survivorship rights to personal representatives who bring actions within two years is not unreasonable;

(2) Alabama law governs in determining whether a personal representative has been appointed;

(3) Claimants who sue in Alabama for wrongful death under § 1983 for injury to their own interests (if such a claim is allowable) must commence suit within one year; and

(4) This court can borrow the applicable statute of limitations under § 6-5-410, Code of Alabama 1975, only if the action is brought within two years by a duly appointed personal representative.

An order in accordance with this memorandum opinion will be contemporaneously entered.

This the 29th day of June, 1981.

/s/ Robert B. Propst
United States District Judge

APPENDIX C

CAROLYN N. HESS, Administratrix
of the Estate of David Milano,
deceased, Plaintiff-Appellee,

v.

BOB EDDY, et al., Defendants,
Appellants,

No. 81-7634

United States Court of Appeals,
Eleventh Circuit.

Oct. 21, 1982.

Appeal from the United States District
Court for the Northern District of Alabama.

Before HILL and HATCHETT, Circuit
Judges, and GOLDBERG*, Senior Circuit Judge.

GOLDBERG, Circuit Judge:

In this appeal, we are asked to decide
whether a civil rights action is time barred
if a person other than the "real party in
interest" brings suit within the applicable

*Honorable Irving L. Goldberg, U.S.
Circuit Judge for the Fifth Circuit, sitting
by designation.

limitations period, and the real party in interest first joins and ratifies the action only after the limitations period has run. We conclude that the Federal Rules of Civil Procedure allow for an amendment or ratification by the real party in interest, that the amendment or ratification relates back to the time suit was initially filed, and that the real party in interest's action is therefore not time barred.

1. FACTS AND PROCEDURAL HISTORY

On November 2, 1978, an inmate in an Alabama county jail was brutally murdered by a fellow prisoner. On October 31, 1980, the victim's widow brought this civil rights damage action, alleging that her husband's death had been caused by the local prison officials' failure to provide safe and secure conditions of confinement. The plaintiff filed her civil rights damage action in U.S. District Court pursuant to 42 U.S.C. § 1983.

She brought suit in two capacities: as the victim's widow and as the administratrix of his estate. However, it was later determined that the plaintiff had not been appointed administratrix of her late husband's estate until some time after she had filed her action.¹ At that time, she amended her original complaint so as to reflect her new status as administratrix and to indicate her ratification of the initial filing of suit.

Unfortunately, the plaintiff's ex post facto ratification of the suit did not satisfy the defendants. They sought to dismiss her action, arguing that she could properly bring suit only after she had been appointed administratrix of her husband's estate, that

¹ Although the plaintiff filed her petition for letters of administration with the local state probate court on October 31, 1980, she was not actually appointed as administratrix until three months later.

the two-year limitations period set forth in Alabama's wrongful death statute would apply in this § 1983 action, and that because she had been appointed administratrix after the two-year limitations period had run, her action was time barred. The district court took up the defendants' motion, held that the suit was indeed time barred, and dismissed the action. The plaintiff then brought this appeal.²

II. ANALYSIS

This appeal does not involve a pure question of limitations, for it is conceded that the complaint in this action was filed within the two-year limitations period.³ The prob-

²The plaintiff brought claims both as an individual and as administratrix of her late husband's estate. Each of these claims was dismissed by the district court. The plaintiff now appeals from the dismissal of the claims brought in her representative capacity. She does not appeal from the judgment dismissing her individual claims

³The decedent was killed on November 2, 1978. His widow brought suit on October 31, 1980, less than two years later.

lem here is that the "real party in interest" did not bring suit within the two-year limitations period.

The district court held that the only party who could properly bring this section 1983 action was the administratrix of the decedent's estate and that because the plaintiff was not yet the administratrix at the time she filed her complaint, the action had actually not been brought within the limitations period. Moreover, the district court held that the subsequent amendment of the complaint and its ratification by the real party in interest did not "relate back" to the initial filing of suit.

In finding that the subsequent amendment and ratification by the real party in interest did not relate back to the time of the initial filing, the district court relied upon Alabama state law which rejects the "relation back"

doctrine in wrongful death actions.⁴ The district court held that Alabama's rejection of the "relation back" doctrine precluded its application in this case. With this we must disagree.

⁴ In the Alabama courts, a wrongful death suit brought by someone other than a duly appointed administratrix is void, and a subsequent amendment or ratification of the action by the real party in interest does not relate back to the time of initial filing. Downtown Nursing Home, Inc. v. Pool, 375 So.2d 465 (Ala. 1979); Strickland v. Mobile Towing & Wrecking Co., 293 Ala. 348, 303 So.2d 98 (1974). Thus, if amendment or ratification by the duly-appointed administratrix only occurs after the limitations period has run, the action is time barred. Downtown Nursing Home, Inc. v. Pool, *supra*; Strickland v. Mobile Towing & Wrecking Co., *supra*. In rejecting the "relation back" doctrine, Alabama represents a minority position among common law jurisdictions. See Annot. 3 A.L.R. 3d 1234 ("Running of Statute of Limitations As Affected by Doctrine of Relation Back of Appointment of Administratrix"). However, it is not our place to comment upon the wisdom of Alabama's procedural rules. The sole question before us is whether the trial court acted properly in applying the Alabama rule in federal court.

In actions brought pursuant to 42 U.S.C. § 1983, federal courts may indeed apply rules of state law to questions as to which Congress has not provided clear guidance. Congress did not provide a statute of limitations for section 1983. Therefore, the district court correctly applied Alabama law to determine the applicable limitations period and properly held that the two-year limit set forth in Alabama's wrongful death statute would control in this case.⁵ Similarly, Congress did not provide rules of survivorship for section 1983 actions. Therefore, the district court acted properly in

⁵ In civil rights damage actions brought pursuant to § 1983, a federal court must apply the most nearly analogous state statute of limitations. Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L. Ed.2d 440 (1980); Johnson v. Railway Express Agency, Inc. 421 U.S. 454, 95 S.Ct. 1716, 44 L. Ed.2d 295 (1975); Rubin v. O'Koren, 644 F.2d 1023, 1025 (5th Cir. 1981). In this case, Alabama's wrongful death statute, Ala. Code § 6-5-410 (1977), provides for a two-year limitations period.

applying Alabama law to determine that the decedent's right of action survived his death and that the only party who could properly assert this claim would be the administratrix of his estate.⁶ However, we find that the trial court erred in applying Alabama's "no relation back" rule in the face of a Federal Rule of Civil Procedure that expressly authorizes and adopts the "relation back" doctrine.

Rule 17(a) of the Federal Rules of Civil Procedure states that:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objections for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substi-

⁶ In a civil rights damage action brought pursuant to § 1983, rights of survivorship are to be determined according to state law. Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

tution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed. R. Civ. P. 17(a).

The plain language of the Rule clearly provides that when an action is brought by someone other than the real party in interest within the limitations period, and the real party in interest joins or ratifies the action after the limitations period has run, the amendment or ratification relates back to the time suit was originally filed and the action need not be dismissed as time barred.

Our interpretation of Rule 17(a) and its applicability in this context is supported by both the cases and the commentators. For example, in Levinson v. Deupree, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953), the Supreme Court held that where a wrongful death action is brought by a party not yet properly appointed as the administrator of the decedent's

estate, and where proper appointment occurs only after the applicable state limitations period has run, a federal court must allow the appointment to "relate back" to the time of initial filing--even though the forum state would not allow such a "relation back" and would hold the action time barred in its own courts.

Congress codified the rule of Levinson v. Deupree, supra, in its 1966 amendments to Rule 17(a)⁷. Since the promulgation of that revised Rule, Commentators have consistently stated that the "Rule . . . restrict[s] dismissal and require[s] . . . relation back instead, overrid[ing] state practice to the contrary." 3A Moore's Federal Practice

⁷The Notes of the Advisory Committee to Rule 17(a) state that the Rule is "intended to codify in broad terms the salutary principle of Levinson v. Deupree."

¶ 17.09, at 170129 (2d ed. 1982) (emphasis added).

[The] main thrust [of the 1966 Amendment to Rule 17(a)] is to allow a correction in parties after the statute of limitations has run, despite the valid objection that the original action was not brought by the real party in interest

Id. ¶17.15, at 17-183.

[T]here should be no problem finding that the federal court . . . may rely on Rule 17(a) to substitute the real party in interest, and to continue the action, even though the state law, under its statute of limitations, might not allow relation back and would require dismissal.

Id. at 17-183.

[T]he failure to join the real party in interest at the commencement of the action does not require dismissal. Instead, the real party in interest can be joined or substituted and the action continued as it had been instituted in his name.

6 C. Wright & A. Miller, Federal Practice and Procedure § 1541, at 637 (1971).

[T]here is no longer any doubt that a federal court may apply the substitution and relation back provision of Rule 17(a) . . . even though the law of the state in which the court is sitting would not allow relief from the failure to bring suit in the name of the real party in interest and dismissal would be required under the applicable forum state's statute of limitations.

Id. § 1555, at 709.

Finally, we note that the approach urged by these commentators has been consistently followed by the federal courts that have considered the question. See, e.g., Farbwerke Hoechst A.G. vs. M/V "Don Nicky", 589 F.2d 795, 797-798 (5th Cir. 1979) (suit need not be dismissed if real party in interest subsequently joins or ratifies action); Wadsworth v. United States Postal Service, 511 F.2d 64, 65-67 (7th Cir. 1975) (amendment to pleadings adding or substituting plaintiff as real party in interest relates back filing of complaint); Crowder v. Gordons Transports, Inc., 387 F.2d 413, 415 (8th Cir. 1967) (state law did not allow relation back; however, "the issue of relation back is . . . controlled by

the Federal Rules."⁸

We therefore conclude that Rule 17(a) sets forth a rule of procedure that is to be applied in the federal courts. The rule provides that when an action is brought by someone other than the real party in interest, the suit need not be dismissed if the real party in interest subsequently joins or ratifies the action. The Rule further provides that such subsequent joinder or ratification by the real party in interest relates back to the time the suit was first filed. If the initial filing came within the applicable limitations period, the suit is not time barred. Most importantly,

⁸ See also, Motta v. Resource Shipping & Enter Co., 499 F.Supp. 1365, 1369 1374 (S.D.N.Y. 1980); de Vries v. Weinstein Int'l Corp., 80 F.R.D. 452, 458-459 (D. Miss. 1978); Unilever Lt. v. M/T Stolt Voel, 77 F.R.D. 384 (S.D.N.Y. 1977); James v. Nashville Bridge Co., 74 F.R.D. 595, 596-597 (N.D.Miss. 1977); Caldwell v. Metcalfe, 458 F. Supp. 847, 848 (E.D. Tenn. 1977); Honey v. George Hyman Const. Co., 63 F.R.D. 443 (D.D.C. 1974).

the Rule is to be applied even where the courts of the forum state have rejected the "relation back" doctrine. For this reason, we must conclude that the district court erred in applying Alabama law on the question of whether the doctrine of "relation back" would apply in this case. This is a federal civil rights action, brought in a federal court, and it is the Federal Rules of Civil Procedure that must apply.

III. CONCLUSION

The central question in this appeal is controlled by the clear language of the Federal Rules of Civil Procedure.

These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

Surowitz v. Hilton Hotels Corp., 383 U.S.

363, 373, 86 S.Ct. 845, 851, 15 L. Ed.2d 807
(1966)

This action was brought within the applicable limitations period, and the real party in interest (the plaintiff acting qua administratrix) joined and ratified the action shortly thereafter. Rule 17(a) of the Federal Rules of Civil Procedure provides that joinder or ratification by the real party in interest relates back to the time of initial filing. Therefore, we conclude that this suit, now being pursued by the real party in interest, is not time barred. Accordingly, the judgment dismissing the plaintiff's action is REVERSED and this cause is REMANDED for further proceedings.

APPENDIX D

UNITED STATES COURT OF APPEALS

For The Eleventh Circuit

No. 81-7634

D. C. Docket No. CV 80-PT-5275-NE

CAROLYN N. HESS, Administratrix
of the Estate of David Milano,
Deceased,

Plaintiff-Appellant,

versus

BOB EDDY, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the

Northern District of Alabama

Before HILL and HATCHETT, Circuit Judges, and
GOLDBERG*, Senior Circuit Judge.

*Honorable Irving L. Goldberg, U.S. Circuit Judge
for the Fifth Circuit, sitting by designation.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the clerk of this Court.

October 32, 1982

ISSUED AS MANDATE:

APPENDIX E
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7634

CAROLYN N. HESS, etc.,
Plaintiff-Appellant,
versus
BOB EDDY, et al.,
Defendants-Appellees.

Appeal from the United States
District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

(December 10, 1982)

Before HILL and HATCHETT, Circuit Judges,
and GOLDBERG*, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

* Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.